Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1993

Mr. Wayne Blevins
Executive Secretary
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR93-200

Dear Mr. Blevins:

The Teacher Retirement System of Texas (TRS) asks whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 16047.

You have received a request for, among other things, the following:[1]

2. The amounts invested in . . . [TRS real estate investment properties in default, foreclosure, or on the "watch" list of problem properties], the outstanding balances and the current value of the properties; [and]

3. Copies of all correspondence from Gene Reischman to the executive director and/or board of trustees during the first half of 1991 concerning his being placed on administrative leave and impending termination.

You assert information responsive to category two is excepted from required public disclosure by Open Records Act sections 3(a)(1), 3(a)(3), 3(a)(4), 3(a)(10), and 3(a)(11). You claim that information responsive to category three is excepted from required public disclosure by sections 3(a)(1), 3(a)(2), 3(a)(3), and 3(a)(11).

You contend that the requested information concerning TRS investments is excepted pursuant to section 3(a)(4). In Open Records Decision No. 593 (1991), this

[1]You advise that TRS does not possess information responsive to categories one and four. The Open Records Act does not require a governmental body to make information available that it does not possess. Open Records Decision No. 558 (1990). You advise that information responsive to categories five, six, and seven will be made available to the requestor.

office ruled that investment and revenue information maintained by TRS, similar to the information at issue in the present matter, was excepted from public disclosure by section 3(a)(4) because the information would obviously benefit investment competitors. *See* Open Records Decision No. 593 at 5 - 7. Therefore, we rule that the information at issue is excepted from required public disclosure for the reasons more fully stated in Open Records Decision No. 593. Because we hold this information to be excepted under section 3(a)(4), we need not address its availability under sections 3(a)(1), 3(a)(3), 3(a)(10), and 3(a)(11) at this time.

Concerning category three, you have submitted for our review a letter from Mr. Owen Reischman to the Board of Trustees and Investment Advisory Committee of TRS dated January 29, 1991. You claim that part or all of this document is excepted from required public disclosure by the "false light" privacy doctrine, pursuant to Open Records Act section 3(a)(1), and by sections 3(a)(2), 3(a)(3), and 3(a)(11).

In Open Records Decision No. 579 (1990), this office ruled that information actionable under the tort doctrine of false-light privacy is not within the section 3(a)(1) protection of information deemed confidential by law. We reaffirm that decision here. In Open Records Decision No. 579, this office held that the legislature did not intend this office to make determinations based on false-light privacy doctrine because this office could not make a determination whether the information at issue places an individual in a false light. *Id.* at 6. Moreover, this office held that the standard used for making determinations under the doctrine of false-light privacy was inconsistent with the standards used for making determinations under common-law privacy. Under false-light privacy, it is irrelevant whether the public has a legitimate public concern in the information at issue, while this is an essential consideration under common-law privacy. *Id.* at 7. The decision concluded that, absent more explicit direction from the legislature, false-light privacy was not a valid claim under section 3(a)(1).[2] The TRS, however, may release explanatory information in its possession that is not made confidential by law which clarifies information in the record that may be inaccurate.

You also claim that the requested correspondence is excepted from required public disclosure by section 3(a)(2). Section 3(a)(2) protects information if it meets the test articulated for section 3(a)(1) by the Texas Supreme Court in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *see also* Open Records Decision No. 441 (1986). Generally, actions associated with a person's public employment do not constitute his

[2]We note here that the Texas Supreme Court has recently called into question whether the tort of false-light privacy exists in this state and that, if in fact the tort does exist, it requires a showing of actual malice as an element of recovery. *See Diamond Shamrock Refining and Marketing Company v. Mendez*, 844 S.W.2d 198 (Tex 1992).

private affairs. *See* Open Records Decision No. 470 (1987). This office has held that the *reasons* for an employee's resignation or termination are not ordinarily excepted from required public disclosure by the doctrine of common-law privacy. *See, e.g.*, Open Records Decision Nos. 444 (1986) (reasons for employee's termination not excepted under doctrine of common-law privacy; section 3(a)(2)); 329 (1982); 269 (1981) (documents relating to an employee's resignation may not be withheld under doctrine of common-law privacy; section 3(a)(2)). We have examined the requested correspondence and conclude that it does not contain information that is intimate or embarrassing. Moreover, it is of legitimate public concern. It may not be excepted from required public disclosure by section 3(a)(2) of the Open Records Act.

We next consider your claim that the requested correspondence is excepted from required public disclosure by section 3(a)(3), the "litigation exception." Section 3(a)(3) protects information if it relates to pending or reasonably anticipated litigation. Open Records Decision No. 551 (1990). Whether litigation may be reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

You bring to our attention several passages in the requested correspondence that refer to litigation that you advise was either pending or anticipated as of the date of your letter. You have not provided us with any evidence, however, that indicates whether this information has previously been made available to the opposing party to the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.* through discovery or other means, no section 3(a)(3) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). This office will assume the information has been obtained by all parties to the litigation and therefore cannot be withheld under section 3(a)(3) unless this office receives within 15 days of the date of this ruling statements from you indicating otherwise and clarifying that such litigation is pending or reasonably anticipated *at this time*.

Finally, you claim that the requested correspondence is excepted from required public disclosure by section 3(a)(11). Section 3(a)(11) excepts from public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency."

For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 413. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review the information and your initial decision to seek closure of this

information. If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the correspondence at issue, along with your arguments for withholding the information pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your arguments in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-200.

Very truly yours,

Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/GCK/le

Enclosures: submitted documents

Ref: ID# 16047
ID# 16968
ID# 16703
ID# 17165

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